Supreme Court, U.S.
FILED
MAY 4 198
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1331

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RANDY ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

FREDERICK F. COHN
205 W. Wacker Drive
Chicago, Illinois 60606
(312) 641-0692
Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1331

RANDY ROY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

1.

Defendant's Sixth Amendment constitutional right of confrontation (as embodied in Fourteenth Amendment due process of law) was violated when defendant was prevented from demonstrating the extent of benefit being received by a co-defendant State witness--i.e., that the witness would receive probation and nine months incarceration, where, if he did not cooperate, he was facing a mandatory minimum prison term of six years.

Respondent, based on one question put to the witness, i.e., that the witness is not aware of a mandatory prison sentence, asserts that limitation of confrontation is appropriate. (Resp. Br. p. 6) The error of this position is that cross-examination is designed to bring forth the truth, and surely, further inquiry concerning this crucial issue should have been permitted. One cannot conclude from the Record that the witness was not aware that he could not have received probation if he did not cooperate with the authorities.

Further inquiry should have been permitted.

Such inquiry could have included questions such as:

> Question: When you were first charged, did you discuss with anyone the minimum penalty you

would have to serve if convicted?

Question: Did you know that under the charges that were dismissed, if convicted, you would be required to go to the penitentiary?

Question: Did you know, or had you been advised that if convicted on the charges that were dismissed, probation was not available?

Question: At your arraignment, were you advised that if you did not appear for trial, you could be prosecuted, and the nature and extent of the penalties that can be imposed upon you if convicted?[1]

These and similar questions could have been put to this witness, which could have exposed substantial bias of the

---

1. In Illinois, prosecution of the defendant may proceed in absentia upon non-appearance. See Ill. Rev. Stat., Chap. 38, Sec. 115-4-1.

witness, if not for the application of the "Illinois rule".

Respondent's argument that the Illinois State Court ruling is based upon the witness' assertion that he did not know that he was avoiding a mandatory minimum, is erroneous. Although the State Court set out the portion of the transcript relied upon by respondent, the Court did not rely upon such lack of knowledge, but instead set forth a rule of law based on its own prior decisions in People v. Lake, 61 Ill.App.3d 428, 378 N.E.2d 364 (1978), and People v. Gibson, 117 Ill.App.3d 270, 452 N.E.2d 1368 (1983), that in Illinois because of prejudice to the State, no inquiry concerning the possible penalty a co-defendant may be facing is permitted. In

discussing its prior decision in People v. Lake, the Appellate Court here stated:

> "We determined that the trial court's limitation of cross-examination of an accomplice was proper to prevent disclosure of the potential sentence facing the defendant." (App. 22)

Thus, the Appellate Court's holding is based on adherence to a State judicial rule of law, and not on any specific factual aspect of this particular case.

Respondent attempts to rely upon extremely distinguishable cases.

United States v. Garrett, 727 F.2d 1003 (11 Cir. 1984) (Resp. Br. p. 4), is distinguishable because there, the court permitted the jury to know of the statutory minimum sentence that the witness was avoiding by obtaining immunity, but merely limited the examination concerning the possible sentences to which he could be sentenced

under provisions that he had never been charged with. As the court said in finding examination was proper:

> "Defense lawyers were permitted to inquire into the circumstances of his arrest, the fact that he struck a deal with the government whereby he would cooperate in exchange for immunity from a crime carrying a five year minimum prison term, his status as a paid government witness, and the extent of his understandings of the various crimes with which he could have been charged." 727 F.2d at 1011. (Emphasis supplied.)

Hence, in Garrett, the court permitted the defense lawyer to do exactly what the court prohibited here: to demonstrate the statutory minimum sentence that the witness was avoiding by cooperating.

Moreover, in Garrett, the trial court limited further inquiry only after it had specifically inquired of the witness whether there had been any discussion with anyone concerning the possibility of

his being charged with the offense similar to that which the defendant faced. As the Court of Appeals stated:

> "In open court, the district judge asked Ruth '[h]as anybody with the government ever advised you of the possibility or that you could be indicted for what is known as a continuing criminal enterprise?' Ruth replied, '[n]o, sir.' As the cross-examination continued, Ruth related that he had never discussed with his attorney the types of federal crimes for which he could have been prosecuted absent the grant of immunity and that he had not been advised of the possibility of the government's securing forfeiture of his property." Ibid.

The Court of Appeals found there was no limitation because, as it said:

> "Indeed, the trial court ruled out but a single line of questioning, and did so only after ascertaining that the witness had no knowledge of the subject. Both the judge's colloquy with the witness and defense counsel's subsequent cross-examination confirm that there was no basis in fact for

the proposed line of questioning." Ibid.

That is not the situation here. Although the witness indicated that he was not aware that the cases being dismissed "got a mandatory prison sentence," there was no further inquiry by the court (outside the jury's presence), as in Garrett, sufficient to "confirm that there was no basis in fact for the proposed line of questioning."

What occurred here is that the State prevented the jury from knowing the extent of benefit being received by the witness for his testimony.

This denied petitioner his constitutional right of confrontation.

Respondent's assertion that other State Courts properly prevent such inquiry is based upon an inadequate analysis of cases.

In State v. Davis, 237 Kan. 155, 697 P.2d 1321 (Resp. Br. pp. 4-5), as distinct from here, the evidence connecting the defendant to the offense was substantial even without the testimony of the co-defendant. Within one hour after the robbery, the defendant was arrested in the vehicle that was used, he was identified by the victim, and the gun used was found in the car. While the court in Davis took the position that the defense could not demonstrate what sentence the co-defendant was avoiding, the independent evidence of defendant's guilt was so substantial that any limitation on right of confrontation would have been harmless. Here, by way of contrast, the sole evidence connecting the defendant to the offense was that of the co-defendant.

In State of Maine v. Larrabee, 377 A.2d 463, and State v. Pierce, Idaho Appellate Court, 685 P.2d 837 (Resp. Br. p. 5), the issue involved the maximum penalty, and not a statutory minimum.

There is a substantial difference between the two situations. Where a person avoids a statutory mandatory minimum term, he avoids a definite time that he would have to serve if he had not cooperated. When dealing with maximum terms, any assertion is merely speculative as to what sentence he could possibly get. Experience teaches that most offenders are not sentenced to the maximum term. Hence, while the statutory mandatory minimum is crucial for the jury to understand the benefit actually obtained by the State witness, knowing

the potential maximum term is not crucial.

Additionally, in Pierce, the decision occurred in the context of a rule of law set out in the Idaho statutes, requiring that a conviction "cannot be had on testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense." No such rule of law is applicable in Illinois. Hence, where there is no evidence connecting the defendant with the offense other than that of the accomplice, a far greater reason exists than in Pierce to permit full cross-examination of the accomplice concerning the benefits that he is to receive, including evidence concerning

the mandatory minimum sentence he is avoiding by cooperating.

New York v. DeVito, 438 N.E.2d 874 (Resp. Br. p. 5), cannot be fully analyzed in that it is merely a memorandum opinion which does not assess the facts of the case, and therefore we do not discuss it.

Respondent's reliance on United States v. Del Toro Soto, 676 F.2d 13 (1 Cir. 1982) (Resp. Br. p. 6), cannot properly be based on a single sentence from the opinion. There, the jury was actually advised through the testimony of the co-defendant:

> "As far as I understand it, if I were found guilty in the four counts, I would have to be admitted to imprisonment for twenty-five years." Id. at 19.

Hence, there was no harm to defendant, because the jurors were provided the

facts from which they could assess the real benefit to the State's witness.

Respondent has not contested that the rule in Illinois is contrary to that of a majority of the other States. See Petition for Writ of Certiorari, pp. 17-20.

This is a crucial issue that needs to be resolved, and this Court should provide guidance for all the States. Uniformity amongst the States on this issue is essential to preserve the federally guaranteed constitutional right to confrontation. Certiorari therefore should be granted.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner